Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C Sec. 160(c)	)	WC Docket No. 04-405
from Application of Computer Inquiry and	)	
Title II Common-Carriage Requirements	)	

COMMENTS OF FDN COMMUNICATIONS, INC. AND PAC-WEST TELECOMM, INC

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For the reasons stated below, FDN Communications, Inc., and Pac-West Telecomm, Inc. ("Joint CLECs") request that the Commission deny the above-captioned petition filed by BellSouth Telecommunications, Inc.

I. INTRODUCTION AND SUMMARY

> "The growth and continued success of the Internet, and the ability of market forces to sustain and encourage that growth, can be attributed to one basic attribute: the openness of both the Internet and the underlying telecommunications infrastructure."[1]

The Commission has firmly established that the digital future is here. Central to that digital future is the development of IP-Enabled services that allow carriers to deploy one network for all services, voice, data, video and other applications unforeseen. The advantages of the IP-based network are undisputed. Still these IP-enabled services require the use of transmission facilities capable of transmitting information at blinding speeds. Thirty years ago the Commission foresaw the coming convergence of computer services with telecommunications

[1] Office of Plans and Policy Working Paper Series No. 31, *The FCC and the Unregulation of the Internet*, Jason D. Oxman, at 6 (1999).

services and responded, by taking regulatory action to protect the nascent competitive "information services"[2] market from anti-competitive forces. To that end the Commission's *Computer Inquiry* proceeding established that the information services market would remain free from the regulation the Commission found necessary in the monopoly telecommunications market. Importantly, the Commission found that Sections 201 and 202 do not allow telecommunications carriers to impose unjust and unreasonable terms, or charge unreasonably discriminatory rates, to non-affiliated ISPs. To protect the growing information services market from carriers with market power, the Commission required all telecommunications carriers that owned their transmission facilities and provided bundled information and telecommunications services to offer the telecommunications services to independent ISPs on a stand-alone basis, as common carriers are obligated to do, on just and reasonable terms at rates that are not unreasonably discriminatory to unaffiliated ISPs. This core holding of the *Computer Inquiry* proceedings opened up the floodgates of competition and innovation in the information services market.

The Commission's predictive judgment has largely been justified by the vigorous competition and innovation in the information services market and the robust commercial development of the Internet. Yet here stands BellSouth asking the Commission to dismantle the

[2] In *Computer I*, the Commission adopted the terminology "enhanced services" and "basic services" to differentiate between the unregulated and the regulated markets. The 1996 Act codified this terminology using the terms "information service" instead of "enhanced services" and telecommunications services" instead of "basic service." *Implementation of the Non-Accounting Safeguards of Sections 271 and 271 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996). For consistency, these comments will use the terms of the 1996 Act even to refer to Commission orders rules and policies in place before 1996.

regime that laid the important groundwork for "the explosion in consumer access to new services and applications" using the Internet.[3]

Claiming that it no longer has market power because cable companies have responded faster to the demand for residential broadband services, BellSouth ignores history and asks the Commission to erase its institutional hard drive and disregard the framework that established that telecommunications carriers with market power should provide access to those transmission facilities on just and reasonable terms and that rates and terms for such access shall not be unreasonably discriminatory. BellSouth would have the Commission discard these core provisions of common carriage, codified in the definition of "Telecommunications Service" in the Act.

As these comments explain below, there is no justification for committing such violence to the Act. First, elimination of the core protections the Commission adopted in the *Computer Inquiry* proceeding is inconsistent with the Commission's stated goal of promoting the deployment and innovation offered by IP-Enabled Services, including of course VoIP. The safeguards of the *Computer Inquiry* proceedings and Title II remain essential components of the concept of "Net Freedom" that would ensure consumers have unfettered access to the applications and services they choose.

Further, consumers of broadband services will be harmed if BellSouth, who still controls the vast majority of the local exchange market in its region, can leverage its dominance in the local exchange market to impede the competitive deployment of services such as VoIP that pose a serious a challenge to Bellsouth's hegemony in the market for voice communications.

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[3] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at p. 24 (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").

Second, BellSouth's proposed elimination of the regulations and statutory framework would be inconsistent with the statutory provisions and law governing forbearance under the Communications Act. The *Computer Inquiry* safeguards and Title II remain crucial because there is at best a duopoly for the provision of residential broadband services which the Commission has repeatedly found insufficient to discipline carriers with market power. Nor has intermodal competition from new technologies such as WiMax or BPL and older technologies such as fixed wireless and satellite yet to demonstrate the ability to serve as substantial competitors in the residential broadband market. Of course intermodal competition from cable in the business market is virtually nonexistent and the Commission recently reaffirmed the need for intramodal competition through the use of unbundled access to ILEC network elements.

Third, the requested forbearance would harm consumers. The presence of residential cable broadband services does not discipline BellSouth's powerful incentive to use its control over bottleneck broadband transmission facilities to stifle future growth of third party VoIP services. And the minimal cost of Bellsouth's compliance with the *Computer Inquiry* safeguards is worth the continued advancements in innovation, investment and competition.

Finally, BellSouth's petition does not satisfy the requirement that it be in the public interest. The forbearance provisions of the Act plainly require the Commission to evaluate the effect of the proposed forbearance on competitors as well as competition. BellSouth's practice of refusing to sell DSL service where consumers refuse to subscribe to BellSouth's voice service is exhibit A of why the safeguards of Title II and the *Computer Inquiry* remain vital to the public interest. Given the fact that there is no wholesale market for broadband transmission facilities, particularly in the residential market, the Commission must find that the relief BellSouth requests does not serve the public interest.

II. THE COMMISSION SHOULD BE GUIDED BY THE GOAL OF ENCOURAGING THE DEVELOPMENT OF IP-ENABLED SERVICES

In the *IP-Enabled Services NPRM*, the Commission announced the goal of facilitating the transition to an IP-enabled telecommunications marketplace.[4] The Commission predicted that the rise of IP-enabled communications would lead to many revolutionary and beneficial changes including reductions in the cost of communication, innovation and individualization of services. Joint CLECs agree with the Commission's prediction. Joint CLECs and/or their affiliates are actively exploring opportunities for participation in the IP-enabled market and are already incorporating IP technology in their offerings.

As in the *IP-Enabled Services Proceeding*, the Commission should be guided here by the goal of facilitating and encouraging competitive IP-enabled services. The Commission should evaluate BellSouth's remarkably candid request that the Commission allow BellSouth to discriminate in favor of its own affiliated VoIP operations, and against independent providers, and to cross-subsidize its own operations, in light of the obviously harmful impact such discrimination would have on the still nascent IP-enabled marketplace. As explained in these comments, BellSouth could and would use the relief requested in its Petition to harm consumers, competitors and competition. This, in turn, would retard, or entirely preclude, the beneficial developments predicted in the *IP-Enabled Services NPRM*.

To protect its goal of facilitating effective competition in the IP-enabled services market, the Commission should deny BellSouth's petition.

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[4] *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867 ¶ 5 ("*IP-Enabled NPRM*").

III. CONSUMERS AND CLECS WOULD BE SERIOUSLY HARMED IF BELLSOUTH COULD DISCRIMINATE IN FAVOR OF ITS OWN VoIP AND IP-ENABLED OPERATIONS

A. Computer Inquiry Safeguards Remain Valid in the Broadband Marketplace

While some of the details of the *Computer Inquiry* regulation may be ripe for reevaluation, the core principles of the existing scheme – consumer access to information services providers on an open and nondiscriminatory basis – remains an essential component of Chairman Powell's policy of "Net Freedom," in which "ensuring that consumers can obtain and use the content, applications and devices they want is critical to unlocking the vast potential of the broadband Internet."[5] The Chairman explained:

> Today, broadband consumers generally enjoy such internet freedom. They can access and use the content, applications and devices of their choice. This easy access includes some of the most promising new uses of broadband. For example, the head of the National Cable and Telecommunications Association recently stated that cable modem providers would not block traffic from competing Internet voice providers … Nevertheless, [the Commission] must keep a sharp eye on market practices that will continue to evolve rapidly. … Preserving "Net Freedom" … will serve as an important "insurance policy" against the potential rise of abusive market power by vertically-integrated broadband providers.

As demonstrated below, BellSouth is precisely one of these "vertically-integrated broadband providers" that has the ability to limit consumers' Net Freedom to access content, applications and devices of their choice. In considering BellSouth's petition, the Commission must take extreme care that it does not surrender the future of innovation and development of consumer broadband services and applications to the mercy of the broadband infrastructure companies – companies that are often more adept at protecting entrenched services than

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[5] *Preserving Internet Freedom: Guiding Principles for the Industry*, Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age" Remarks of Chairman Michael K. Powell, Feb. 8, 2004 at p. 3.

developing new ones. The Commission should not leave consumers dependent on a duopoly to define the entirety of their broadband future. Chairman Powell, in explaining his vote not to approve the proposed DirecTV-EchoStar merger, reasoned that a duopoly market cannot be expected to deliver the benefits of innovation and unfettered competition to consumers:

> At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.[6]

Similarly, Commissioner Abernathy has explained:

> [O]ur *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice.[7]

These principles that Chairman Powell and Commissioner Abernathy articulated provide the context within which the Commission must evaluate and ultimately reject BellSouth's request to exempt itself from the entirety of Title II and the *Computer Inquiry* obligations

B. IP Enabled Broadband Services Will Compete With BellSouth's Service Offerings and Thereby Increase Its Incentive For Discriminatory Conduct

BellSouth has a vested interest in discouraging or blocking consumers from using third party VoIP services provided by CLECs or other third parties. CLEC VoIP service competes with BellSouth's existing local and long-distance offerings, and would also compete with future

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[6] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 Separate Statement of Chairman Michael K. Powell (2002), ("*EchoStar Merger Order*").

[7] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Notice of Proposed Rulemaking, Separate Statement of Commissioner Kathleen Q. Abernathy, 17 FCC Rcd 3019, 3070 (2002).

BellSouth VoIP services. For the first time in American history, the number of incumbent LEC circuit-switched access lines has recently declined.[8] In contrast, the market for VoIP services has grown significantly from 2003 through 2004. VoIP subscribership now exceeds 4 million customers,[9] and is expected to grow to 18 million subscribers by 2008.[10] While CLEC VoIP services have so far not been a major cause of ILEC line losses, CLEC VoIP services will likely significantly compete with traditional incumbent voice services. Thus, BellSouth has strong incentives to thwart provision of CLEC VoIP by discriminating in favor of its own VoIP service.

Even if some IP-enabled services would not compete with traditional services, incumbents would have strong incentives to disadvantage competitors in the race to develop and provide the new IP-enabled services, such as video IP, and enhancements to more traditional services envisioned by the Commission in the *IP-Enabled NPRM*. These new markets are a major opportunity, which BellSouth and other incumbents would like to deny competitors.

BellSouth has demonstrated its willingness and ability to attempt to leverage its power in the broadband access market to suppress competition. For example, BellSouth refuses to sell ADSL service at any price to end-user consumers who do not also purchase BellSouth's circuit-switched traditional voice service. The purpose of BellSouth's DSL tying policy is to discourage consumers from using alternative voice services such as VoIP or wireless services. Far from seeking to conceal this practice, BellSouth has argued affirmatively that restricting consumer choice in this manner is in the public interest.

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[8] *See, e.g.*, *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. August 7, 2003) at Table 7.1.

[9] *See* Merrill Lynch, *Everything Over IP: VoIP—and Beyond*, at 20 (March 12, 2004) ("*Everything Over IP*").

[10] *See id.*

BellSouth's proposal to eliminate all of its Title II and *Computer Inquiry* obligations, which have served as a cornerstone of the nation's Internet policy for over a quarter-century, marks its attempt to open another front in its effort to limit consumer choice. BellSouth itself has elsewhere explained that "closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability."[11] Yet BellSouth's proposal would strengthen its hand to attempt exactly that result. Even before the Commission has considered whether it can or should establish alternative safeguards, BellSouth's proposal would give it free rein to harm competitors by permitting it to establish special relationships with its own IP-enabled operations, deny them to independent providers or even to deny independent providers any access whatsoever.

In this regard, BellSouth's claims that the *Computer Inquiry* safeguards inhibit its ability to make beneficial discriminations in favor of ISPs with specialized needs[12] does not reduce concerns about harmful discrimination. Assuming this is an accurate description of the impact of the *Computer Inquiry* safeguards (which it is not), such "good" incentives to help specialized ISPs could not possibly outweigh its powerful incentives to harm the vast majority of CLECs that use basic transmission services such as DSL.

C. Harm to CLECs Will Be Exacerbated By Broadband Unbundling Relief

BellSouth's ability to harm CLEC VoIP providers will unfortunately be enhanced because of the broadband unbundling relief adopted by the Commission in the *Triennial Review Order, and the 271 Forbearance Order*. Now that the Commission has limited the ability of CLECs to obtain broadband UNEs to serve the mass market, the Commission has seriously

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[11] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation at 46 (April 8, 2003).

[12] Petition at 22.

harmed CLECs ability to provide IP-enabled services to that market. Further, because CLECs are nonetheless impaired in their ability to serve that market without broadband UNE access, CLECs will not realistically be able to construct their own broadband networks. In light of these practical difficulties and unbundling limitations, CLECs' VoIP operations will be particularly vulnerable to BOC efforts to favor their own VoIP operations while potentially denying DSL and other access, or offering it on less favorable terms, to CLECs in comparison to what the BOC provides to itself.

IV. THE STATUTORY STANDARDS FOR FORBEARANCE ARE NOT MET

When Congress amended the Communications Act in 1996, it gave the Commission significant powers to strip away outdated regulations that no longer promoted competition but stifled it. But Congress in no way intended that the Commission would use the forbearance provisions of the Act to undermine the very structure of the Act. BellSouth's petition is no more than a poorly veiled attempt to obtain, through forbearance, reclassification of ILEC DSL transmission service as an "information service" rather than as a "telecommunications service." Apart from attempting an end run on the Commission's rulemaking process, and its measured decision to await the ruling from the Supreme Court on the related *Brand X* case before addressing the statutory classification issue, BellSouth's petition is obviously defective on the merits and should be denied.

The Commission has made it clear that, under Section 10, it "cannot assume, that absent [the provision or regulation] market conditions or any other factor will adequately ensure that the charges, practices, classifications and services … are just and reasonable and not unjustly or

unreasonable discriminatory."[13] BellSouth's petition, however, is long on assumption, and short on empirical evidence to support its claims that consumers and the ISPs that serve them have sufficient intermodal competitive alternatives so that eliminating the *Computer Inquiry* safeguards and the panoply of Title II regulation would not lead to the imposition of anti-consumer and anti-competitive practices and rates in the broadband market.

The forbearance provisions of Section 10 provide:

> the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

The legal framework for the Commission to evaluate BellSouth's Section 10 petition is firmly established under Commission and D.C. Circuit precedent. In particular, the test under section 10 is conjunctive. The Commission should "deny a petition for forbearance if it finds that *any* one of the three prongs is unsatisfied."[14]

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[13] *1998 Biennial Regulatory Review—Review of ARMIS Reporting Requirements*, Report and Order, *Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, Fifth Report and Order,14 FCC Rcd 11443, 11461 ¶ 32 (1999) ("*ITTA Forbearance Order*").

[14] *CTIA v. FCC*, 330 F.3d, 502, 509 (D.C. Cir. 2003) (emphasis supplied) (FCC was correct in denying petition to forbear from applying wireless local number portability under 10(a)(2) without addressing other two provisions under 10(a).)

The statute further requires the Commission to tailor its forbearance findings to specific markets or specific carriers. Section 10 directs the Commission to forbear only "in any or some" of the markets where the petitioner shows the forbearance criteria are met. In other words, the statute expects that the petition and the Commission's analysis will be sufficiently granular and will not make broad sweeping regulatory pronouncements where narrower findings are more appropriate. This approach is consistent with judicial guidance regarding the required standards for assessing entry barriers in the local telecommunications market.[15] To assess properly whether a carrier possesses market power, the Commission has found that "the proper market aggregates those consumers with similar choices regarding a particular good or service in the same geographic area."[16] For purposes of BellSouth's petition, for example, if the Commission determines that regulation is no longer necessary to protect consumers who can choose between an ILEC's DSL service and cable modem service, it must consider separately whether the same is true for the many consumers, in distinct geographic markets, who lack access to cable broadband services but do have access to DSL service.

If for no other reason, the Commission should deny BellSouth's petition because it has failed to identify specific product or customer markets for which it seeks relief. It has failed to identify or separately address voice versus broadband or enterprise versus mass-market services.

Assuming the Commission does not dismiss the petition due to this threshold defect, the Commission should ensure that its analysis is limited to the appropriate product market. As it has in analyzing carrier petitions for non-dominant regulatory classification, the Commission should analyze the product market for DSL services using substitutable services. The

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[15] *USTA v. FCC*, *290* F.3d 415, 426 (D.C. Cir. 2002).

[16] *WorldCom v. FCC*, 238 F.3d 449, 461, *citing* NYNEX *Corporation, Transferor and Bell Atlantic Corp. Transferee*, Memorandum Opinion and Order, 12 FCC Rcd. 19,985, 20,016 ¶ 54 (1997).

Commission's recent *Advanced Services Report* makes clear that there are differences in the residential and business market that warrant analysis in separate product markets.[17] Thus, rather than sweep all of BellSouth's broadband service into one product market, the Commission must consider separately the effects of forbearance for business customers and residential customers because the services are not substitutable.

A. *Computer Inquiry* Safeguards Are Necessary to Assure that ILEC Charges, Practices, Classifications, and Relations Are Just and Reasonable and Not Unjustly Discriminatory

When the Commission reviewed the *Computer Inquiry* safeguards in 1999, it determined that "until full competition is realized, certain safeguards may still be necessary."[18] BellSouth's petition in effect, claims that competition between one ILEC and one franchised cable company for broadband transmission services in the residential market, each with a virtually monopoly market in their primary line of service, each with an affiliate providing its own Internet access services, and each with a strong economic interest in limiting competition from third parties, somehow amounts to the "fully competitive market" for information services envisioned when the Commission first crafted the *Computer Inquiry* safeguards over thirty years ago. There is simply no basis in law or policy that would justify the premature dismantling of the regulatory framework responsible for the development of the Internet and robust competition in the information services market.

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[17] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").

[18] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA* Requirements, CC Docket 98-10, Further Notice of Proposed Rulemaking 13 FCC Rcd 6040, 6046 ¶ 7 (1998) ("*Computer III Further Remand Further Notice*").

BellSouth suggests that competition from cable companies in the broadband market alleviates any need for the Commission to retain Title II and the *Computer Inquiry* safeguards.[19] This claim is based on BellSouth's theory that cable company share of the market for broadband is dispositive of the Section 10(a)(1) analysis. In other words, BellSouth claims that because cable has a higher market share in the residential broadband market, BellSouth lacks the market power to charge unreasonable rates, impose unreasonable practices, or deny and frustrate access to third party information services not only in the residential market but in any market. There are significant problems with BellSouth's approach. First, evidence of BellSouth's market share is not by itself sufficient to demonstrate that BellSouth has met the forbearance criteria. To assess market power in this instance, the Commission must adhere to the market power analysis it traditionally employs when evaluating whether a carrier is non-dominant which also considers supply and demand elasticities and barriers to entry. BellSouth offers no evidence on any of these factors except for market share, and its evidence on market share does not support its claims.

1. BOCs Have Market Power in the Provision of Broadband

Antitrust law and Commission precedent establish how the Commission should assess whether a carrier possesses market power. Market power is typically defined as a firm's ability to "exclude competition or control prices."[20] The law makes clear that the assessment of whether BellSouth has market power in the broadband services market does not rest solely on BellSouth's market share.[21] The Commission "has never viewed market share as an essential factor.[22]

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[19] Petition at 17.

[20] *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

[21] *See United States v. General Dynamics*, 415 U.S. 486, 498, (1974); *see also AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

[22] *AT&T v. FCC*, 236 F.3d at 729.

Rather, as the Commission and the courts have explained, the Commission must make a broader inquiry. In *AT&T v. FCC*, the D.C. Circuit reversed the determination that a firm's market power was dispositive where the Commission did not address other factors enumerated in non-dominance cases.[23] BellSouth's petition makes no mention of any other factors except market share. Under the *AT&T* precedent, the Commission cannot lawfully grant BellSouth's petition without considering other factors, and since BellSouth failed to address the other factors, its petition must be denied.

Other measures of competition in the market for broadband further erode the already shaky foundation that BellSouth attempts to lay in its petition. For instance, the Commission's competition analysis typically considers demand and supply elasticities; that is, how consumers could substitute other services for the service in question, or how new entrants and existing competitors could add capacity to serve consumers that would seek alternatives to overpriced ILEC broadband.

a. Market Share Analysis Demonstrates that in Most Markets BellSouth is either a Monopolist or a Duopolist

Evidence in the Commission's possession and evidence provided in other related proceedings shows that in the vast majority of markets there are no more than two facilities based providers of broadband service.[24] In many markets ILEC DSL service is the only broadband service available because cable is typically not available, for instance in rural areas and in business markets in all geographic markets. BellSouth's petition conveniently ignores any

[23] *AT&T*, 236 F.3d at 737.

[24] *See Fourth Advanced Services Report* at 30, chart 8 (demonstrating that 53.7% of U.S. zip codes have three or fewer broadband service providers; after removing wide-ranging satellite and other wireless broadband service providers from this analysis (such providers account for only 0.4% of the broadband market, but can cover large service areas), a duopoly of broadband access is clearly evident in most U.S. markets).

distinction between the mass market and enterprise markets. Despite the Commission's statements of hope in its *Advanced Services Report*, other broadband platforms at this point show no signs of developing into viable substitutes for ILEC broadband service or cable modem service.

BellSouth asserts that the limited intermodal competition between cable and ILEC DSL means that consumers have the benefit of "rates that are just and reasonable."[25] BellSouth's contention is wrong both on the facts and wrong on the law. Marketplace evidence suggests that the limited duopoly competition between cable and ILEC DSL is not sufficiently competitive to impact the rates and practices of the duopolies and traditional competition doctrine requires three or more relatively equal size market participants offering substitutable services before a market can be deemed sufficiently competitive.[26]

Wall Street reports confirm this analysis. For instance, Merrill Lynch suggests:

> If "light" regulation prevails, pricing could go even lower. The stakes here are very high – a multi-provider VoIP market likely implies aggressive competition and thin margins. This is a worse outcome for telcos (and for cable) than a more stable market structure with one principal competitor to the telcos.[27]

Merrill Lynch elsewhere explains that the current market for broadband is at best a two-company market and "the risk is that a two-player market for broadband data services becomes a multi-player market."[28]

While Wall Street may prefer "a more stable market structure" with inflated prices and a duopoly where the principal market participants can coordinate pricing, exclude new entrants,

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[25] Petition at 19.

[26] *Echostar Merger Order* at 20604 ¶¶ 99-101.

[27] *Everything Over IP*, at 3.

[28] *Id*. at 4.

and increase earnings and profits, such superficial competition is not in the interest of American consumers.

BellSouth contends that the superficial competition between cable and DSL has led to a price war. However, the BOCs, in fact, have raised prices. SBC raised prices for its lowest tiered DSL service approximately 10%.[29] Further, if the BOCs faced serious, rather than superficial, competition they would not illegally tie the offering of DSL to use of their monopoly local exchange voice service.[30]

As suggested above, BellSouth's market share argument is also flawed because it ignores material differences among markets. Indeed, there are many geographic markets where a substantial percentage of residents can only obtain DSL.[31] There also is virtually no competition from cable outside the mass-market, where the ILECs continue to control vital bottleneck last mile transmission facilities. Cable has little if any viable presence in the small business market, losing market share in 2003 and reaching only 4.2% of the remote office market.[32] Thus it is not surprising that analysts conclude "DSL operators dominate the U.S. [small business] broadband and enterprise remote-office broadband market."[33]

There is even less support for BellSouth's dubious claim that fixed wireless technologies, satellite or Broadband over Power Line ("BPL") present either current or near term competition

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[29] *Everything Over IP* at 11.

[30] *See generally BellSouth Telecommunications, Inc., Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket 03-251, Comments of FDN Communications, filed Jan. 30, 2004 ("*FDN DSL Tying Comments*").

[31] *IP-Enabled Services*, WC Docket 04-36, Competition in the Provision of Voice Over IP and IP-Enabled Services, attached to *Ex parte* Letter to Marlene H. Dortch from Evan Leo, Counsel for BellSouth, SBC, Qwest and Verizon, (filed May 28, 2004) at A2 ("*BOC VoIP Report*").

[32] Yankee Group, *Cable and DSL Battle for Broadband Dominance*, (February 2004) at 4-5.

[33] *Id*. at 4.

sufficient to discipline ILECs anticompetitive behavior in the broadband market. There is no compelling evidence that consumers view these services, some of which have not even been offered on a widely available commercial basis, as substitutes for DSL or cable broadband.[34] According to the Commission's own data, the combined market share for broadband technologies other than cable or DSL has decreased since 1999. These statistics show that fixed wireless and satellite combined now have 1.3% of the market compared to 2.8% in 1999,[35] and analysts expect little movement upwards.[36] Other technologies such as WiMAX, mobile wireless and BPL have not been deployed on a generally available commercial basis, if deployed at all.[37] The Commission cannot seriously entertain the theory that these technologies, whose commercial viability the market has not yet tested, can actually restrain the ILEC's anti-competitive behavior should the Commission eliminate the Title II and *Computer Inquiry* safeguards.

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[34] BellSouth's reliance on pronouncements from StarBand is reflective of the overall lack of evidence BellSouth can muster to support its petition. BellSouth claims that StarBand is a viable intermodal competitor when it had only 38,000 customers at the end of 2003 and is offering a new 1mbps service at virtually double the price SBC provides the same level of DSL. The example of StarBand, if anything, reflects the lack of effective competition in the residential broadband market.

[35] *High Speed Services for Internet Access: Status as of December 31, 2003* Tables 1-4, (June 2004). ("*FCC High Speed Report*")

[36] *See* Gartner, Inc., *Consumer Telecommunications and Online Market*: United States 2002-2007 (Dec. 2003) at 3.

[37] *See BOC VoIP Report* at A13. WiMax faces significant obstacles before the Commission can asses whether it might emerge as a serious broadband competitor. *See* Bear Stearns, *US Wireline/Wireless Services* (June 2004) at 5. WiMax will have "limited impact on wireline carriers in the near term.") While power companies are experimenting with BPL, deployment is limited to trial markets, and it is unclear whether powerline infrastructure will be capable of supporting a service truly substitutable for cable or telco broadband. Analysts expect BPL to have only 220,000 subscribers nationwide by 2008. *See* In-State/MDR, *Reaching Critical Mass* at 22. While the BOCs hype mobile wireless 3G competition, *BOC VoIP Report* A18, analysts suggest the technology is immature, Bear Stearns, *U.S. Wireline/Wireless Services* (June 2004) at 47*;* with slow speeds and high costs, *Everything Over IP*, at 41 Table 12.

In this regard, intramodal competition serves to discipline anti-competitive behavior and pricing. For example, while the Commission reports that broadband deployment and penetration has increased, there is currently a disparity between broadband availability and broadband "take rates." Although overall broadband penetration has climbed in recent years, the take rate, or percentage of customers with broadband services available that actually subscribe to such services, remains low for broadband providers.

> Four of the largest cable companies (Comcast, Time Warner, Cox, and Cablevision) now make cable modem service available to between 95 and 100 percent of their homes passed, and between 25 and 36 percent of these companies' video subscribers now take cable modem service. The Bell companies, by contrast, currently make DSL available to about 75-80 percent of their homes passed, and only between 7 and 15 percent of their residential voice subscribers take DSL.[38]

SBC has noted that "[o]verall, the 'take' rate for broadband services is extremely sensitive to price."[39] Clearly, take rates for broadband services will increase when more competitors can enter the broadband market and lower consumer broadband prices. Only then will there be sufficient restraint on BellSouth's natural incentive to discriminate against its competitors.

b. Supply and Demand Elasticity Analysis Confirms BellSouth's Market Power

As noted above, market power analysis must look beyond market share to consider both supply and demand elasticities.[40] The Commission examines supply elasticity to "determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such a

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[38] See BellSouth, Qwest, SBC, and Verizon, Competition in the Provision of Voice Over IP and Other IP-Enabled Services, WC Docket No. 04-36, at A-2 (filed May 28, 2004).

[39] See SBC Communications Inc. Comments, *Deployment of Broadband Networks and Advanced Telecommunications Services*, NTIA Docket No. 011109273-1273-01 (dated Dec. 19, 2001), available at: http://www.ntia.doc.gov/ntiahome/broadband/comments/SBCComments.htm.

[40] *See e.g. United States v. General Dynamics*, 415 U.S. at 498.

carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response."[41] The Commission examines two factors in assessing supply elasticity, the "supply capacity of existing competitors" and "entry barriers."[42]

Based on these factors, supply elasticity in the residential broadband market is low. The first factor is "whether existing competitors have or can relatively easily acquire significant additional capacity" in a relatively short time period.[43] Most competitors in the broadband market currently lack sufficient capacity. As discussed above, except for cable, it is not likely that competitors lacking the scale or scope of the BOC broadband network could easily add capacity to serve a large influx of customers from the ILEC services should the ILECs charge supracompetitive rates to otherwise exercise their market power to raise prices.[44]

Similarly, supply elasticity in all business markets is severely constrained, largely because BellSouth and other BOCs control the overwhelming majority of the bottleneck transmission facilities needed to provide broadband service.[45] The Ad Hoc Users Report shows that in the business market, broadband "special access services from competing providers remains confined to a small number … of concentrated business districts."[46] Even in markets where such service is deployed it "is available on a very limited basis, and the [ILECs] remain

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[41] *COMSAT Corp., Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier,* 13 FCC Rcd 14083, 14,123 ¶ 78 (1998) ("*COMSAT Non-Dominance Order*").

[42] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271, 3293 ¶ 38 (1995) ("*AT&T Non-Dominance Order*").

[43] *Comsat Non-Dominance Order* at 14123 ¶ 78; *AT&T Non-Dominance Order* 3303 ¶ 57-8.

[44] *Compare AT&T Non-Dominance Order*, at 3303-6 ¶¶ 57-64.

[45] *See Competition in Access Markets: A Reality or Illusion, A Proposal for Regulating Uncertain Markets,* Economics & Technology, (August, 2004) at 12, attached to *Ex parte* Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, CC Docket No. 01-338 (filed August 26, 2004) (attaching white paper entitled "")

[46] *Id*.

the sole source of dedicated (special) access connectivity at roughly 98% of all business premises nationwide."[47] As a result, the Commission continues to find that CLECs are impaired without access to high capacity loop and transport elements in most markets in the United States.[48]

Nor are the entry barriers low enough to demonstrate that, if BellSouth raised its prices, a new entrant could efficiently enter the market and begin serving customers fleeing BellSouth's service. Indeed, one of the fundamental reasons Joint CLECs have an interest in this proceeding is because they know that they are unable to deploy their own loops to most customers, and are considering the option of purchasing broadband transmission from ILECs in the event that UNE loops are not a viable option for reaching particular customers. The Commission has found that deployment of loops to provide broadband is a "costly and time consuming" undertaking.[49] The lack of a robust third pipe further confirms the high entry barriers in the broadband market.

Even where competitors could add new capacity through new entry or expansion by existing entrants, demand in the broadband market is inelastic. Demand elasticity refers to "the willingness and ability" of ILEC "customers to switch to another … service provider or otherwise change the amount of services they purchase … in response to a change in the price or

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[47] *Id*. at 11.

[48] *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers*, Press Release, WC Docket 04-313, CC Docket 01-338, rel. Dec. 15, 2004 at 1-2; Separate Statement of Chairman Michael K. Powell at 1 ('we have attempted to permit wide unbundling for the key elements of loops and transport, where there is clear and demonstrable impairment") ("*TRO Remand Press Release*").

[49] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17107 ¶ 205 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) *vacated in part, remanded in part on other grounds, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

quality of … service."[50] Competitors have provided the Commission with evidence that switching broadband providers is problematic, requiring high costs to change equipment and e-mail addresses, thus making it less likely that consumers faced with anticompetitive pricing or practices could flee for another competitor.[51] In short, the supply and demand elasticities confirm that BellSouth and the BOCs retain market power in the broadband market, regardless of the cable company market share in the non-rural residential market.

2. *Computer Inquiry* Safeguards Against Discrimination and Cross-Subsidization Remain Necessary

As long as the companies that own broadband transmission facilities can exercise market power, they will exercise that market power to control downstream markets that rely on those transmission faculties. When faced with competition for their core voice services, the BOCs, as described earlier in these comments, have a strong incentive to exercise their control over broadband transmission facilities to drive non-affiliated VoIP providers out of the market or raise their cost of providing service to frustrate their ability to compete.

In this respect, the Commission's approach in addressing BellSouth's petition must squarely address the ultimate aim of BellSouth's petition – to stifle innovative VoIP services, protect its legacy monopoly over traditional POTS, and extend that monopoly into Internet access and applications. The *Computer Inquiry* safeguards exist precisely to *prevent* dominant carriers from leveraging their control over bottleneck facilities into dominance of a competitive market, namely the enhanced services or information service market. Market power analysis confirms that it remains true today that ILEC control of bottleneck telecommunications facilities without the safeguards adopted in the *Computer Inquiry* would allow ILECs to stifle competition

[50] *Comsat Non-Dominance Order*, at 14120 ¶ 71.

[51] *AT&T Reply Comments*, WC Docket 04-36 at p. 43 filed July 14, 2004.

in the information services market to protect their monopoly in the local voice market from nascent competition from VoIP.

BellSouth already has engaged in anticompetitive tying practices with respect to its DSL service. By forcing consumers that want DSL service from BellSouth to also subscribe to Bell South's local exchange service, BellSouth seeks to preserve its monopoly in the local exchange market. Because DSL is a desirable service that consumers want, they may be reluctant to change voice local exchange providers if that means giving up their DSL service. This is especially problematic throughout BellSouth's nine-state region where there is virtually no intramodal competition for DSL because BellSouth's DLC centric network does not allow for CLECs to provide a competitive DSL service using UNEs.[52] FDN Communications, for example has encountered resistance from local exchange customers to switch to FDN for this reason. Second, as discussed *supra* demand for DSL service is inelastic, because it is cumbersome to switch broadband providers with requirements to change computer configurations, install new software and hardware and switch e-mail addresses.

The BOCs conceivably could attempt to deny VoIP providers access to bottleneck transmission facilities or offer VoIP providers substandard access. For example, as commenters suggest in the IP-Enabled Service proceeding, there is now "technology that exists to enable network operators to recognize the data packets that move across their system and prioritize them. ILECs … could block or assign a lower priority to packets from competing IP-enabled service providers."[53]

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[52] *See FDN DSL Tying Comments* at 3.

[53] *IP-Enabled Services*, WC Docket 04-36, Comments of Enterprise Commun. Ass'n. at 9 (May 28, 2004).

The BOCs could also deter entry or make entry less effective by tying the availability of their last mile broadband facilities to subscription to other monopoly services. As the Commission is aware, three of the BOCs already engage in this sort of anticompetitive conduct, illegally tying the availability of DSL service to subscription to monopoly voice service.

a. Intermodal and Intramodal Competition for Provision of Access Services to ISPs Is Insufficient to Protect Against Discrimination, Cross-Subsidization and Other Unreasonable Practices and Unjust Rates

BellSouth claims that Computer Inquiry safeguards are unnecessary because ISPs may obtain access from intermodal or intramodal providers. In fact, however, there is neither intermodal competition from other transmission providers nor intramodal competition in most places for the transmission facilities on which ISPs rely to provide information services. Recent Commission actions, unfortunately, have made it less likely that new entry will occur in the foreseeable future. The Commission has eliminated ILEC obligations to provide CLECs unbundled access to network elements used in the provision of broadband service, including line sharing, for serving mass market customers.[54] Similarly, it has endeavored to insulate cable modem service providers from any obligation to provide ISPs with wholesale access.[55] Accordingly, there is no rational basis upon which the Commission could conclude that ISPs have assurance of alternatives to reach customers other than LEC Title II common carrier offerings.

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[54] *TRO*, at 17133-5 ¶¶ 258-263 (eliminating line sharing) ¶¶ 17142-5, 274-277 (eliminating access to FTTH loops).

[55] The Commission's 2002 Cable Modem Declaratory ruling is currently pending before the Supreme Court. The Ninth Circuit vacated the ruling that cable modem service is an information service and found that it was instead a telecommunications service, based on the Ninth Circuit's treatment of the same issues in *AT&T v. Portland*. Regardless of the outcome the Commission has stated it has no intention of requiring cable modem providers to fulfill their obligations as telecommunications carriers under the Act and provide ISPs access to their underlying transmission services.

BellSouth contends that the Commission's broadband reporting data demonstrates that cable is the dominant provider, that BOCs require relief to compete effectively, and that regulatory safeguards are no longer need to restrain anticompetitive behavior. However, Commission data shows:

- ADSL growth outpaced cable growth in second half of 2003.[56]
- ADSL growth nearly doubled that of cable in second half of 2003 for residential and small business customers.[57]
- Cable market share has decreased in the residential and small business market from 78.2% to 63.2%, while ADSL doubled from 16.3% to 34.3 %.[58]
- Between 2001 and 2003 DSL growth *doubled* that of cable: 181.8% to 90.9%[59]

In any event, Commission precedent and relevant antitrust case law reinforces the view that the presence of two competitors with their own facilities is insufficient competition to assure that network providers will be unable to harm downstream competitors by discriminating in the provision of access. The Commission has recognized that even if a retail market has multiple competitors, a single firm that controls essential facilities can exercise market power by leveraging its control of those facilities to "increase[e] its rivals' cost or by restricting its rivals' output.[60] The Commission has specifically found that ILECs possess such market power and thus "have the ability and incentive to use their bottleneck facilities to engage in cost misallocation, unlawful discrimination or a price squeeze."[61] Similarly in addressing the ILEC ability to exercise its market power in the broadband market, the Commission found that because

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[56] *FCC High Speed Report* at Table 1.

[57] *Id*. at Table 3.

[58] *Id*.

[59] National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age* at 6 (Sept. 2004).

[60] *LEC Classification Order*, 12 FCC Rcd 15756, 15802 ¶ 83 (1997).

[61] *ITTA Forbearance Petition*, 14 FCC Rcd at 10816 ¶ 7.

ILECs "compete with other providers of advanced services they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new service to consumers."[62]

The Commission has clearly articulated a policy that three or more providers owning their own facilities is a prerequisite before a market can be viewed as sufficiently competitive so that the Commission can remove regulatory safeguards. In its order that effectively derailed he proposed merger between the two rival satellite television firms, the Commission stated "existing antitrust doctrine suggests that a merger to duopoly … faces a strong presumption of illegality.[63] Similarly in the context of its Media Ownership proceeding the Commission articulated that "economic theory and empirical studies" show that "five or more relatively equally size forms" are necessary to achieve a "level of market performance comparable to a fragmented, structurally competitive market."[64]

The Commission's treatment of the EchoStar merger is particularly instructive. The Commission opposed the merger on the basis that for "the vast majority of consumers, it would result in a reduction in the number of competitors from three to two or from two to one."[65] The Commission concluded that as a result "such a drastic reduction in the number of competitors and concomitant increase in concentration create a strong presumption of significant anticompetitive effects."[66]

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[62] *Ameritech-SBC Merger Order*, 14 FCC Rcd 14712, 14802, ¶ 202(1999).

[63] *Echostar-DirectTV Merger Order*, at 20605 ¶ 103.

[64] *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 18 FCC Rcd 13620, 13731 ¶ 289 (2003).

[65] *Echostar Merger Order*, at 20604 ¶ 99.

[66] *Id*.

The Commission's observations regarding the number of firms necessary to constitute a fully functioning competitive market are consistent with the Department of Justice's Merger Guidelines. Commission policy clearly favors market structure where there are 3 or more competitors because duopoly markets "would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers."[67] Such concentrated markets "inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[68]

Antitrust jurisprudence provides further support for the approach that the Commission must be confident that there are more than two facilities based competitors before finding a market structurally competitive. Antitrust law provides that a duopoly market is no better than a monopoly. In a duopoly, both firms, regardless of the allocation of market share have an incentive to exercise market power and have the incentive and means to maintain prices above competitive levels because "firms in a concentrated market … in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[69] A "durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."[70]

In *Heinz*, the D.C. Circuit reversed the lower court's finding that the merger of the second and third largest firms in a three-firm baby-food market would increase the ability of the merged firm to compete with the number one firm.[71] Likewise in *FTC v. Staples*, the court enjoined the merger of two competing office supply superstores where the merger would have left only one

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67 *Echostar Merger Order*, at 20684, Separate Statement of Chairman Powell.

68 *Id.*

69 *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

70 *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

71 *Id.* at 708.

superstore competitor in 15 markets and only two competing superstores in 27 markets.[72] The court found that the merged entity "would allow Staples to increase prices or otherwise maintain prices at an anticompetitive level."[73] These cases are directly on point. The Commission cannot rely on a duopoly to restrain anticompetitive practices and pricing. The Commission certainly cannot, in effect, sanction or ignore the resulting anticompetitive practices in which the ILECs, as explained above, have strong incentives to engage.

This case presents different considerations than the Commission's recent *Section 271 Forbearance Order*. In that case, the Commission found that there were existing and emerging competitors to ILEC broadband offerings from cable companies, third generation wireless, satellite and power lines.[74] It further found that the unbundling obligations under § 271, even though not accompanied by an obligation to price elements at TELRIC rates, still served as a disincentive toward investment in broadband infrastructure.[75] The Order found that "competition from multiple sources and technologies in the retail broadband market, most notably from the cable modem broadband providers, will pressure the BOCs to utilize wholesale customers to grow their share of the broadband market and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business.[76]

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[72] *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997).

[73] *Id.* at 1082.

[74] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338, *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235, *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260, *BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 04-48, Memorandum Opinion and Order, FCC 04-254, rel. Oct. 27, 2004 ¶ 22 ("*Section 271 Forbearance Order*").

[75] *Id*. ¶ 25.

[76] *Id.* ¶ 26

In that decision, however, the Commission was addressing CLEC access to broadband network elements, and it relied in part on the possibility (even if remote) that CLECs could construct their own broadband facilities.[77] Although this was incorrect even with respect to CLECs, there is no reason to believe that ISPs could construct their own facilities. Moreover, as long as the *Computer Inquiry* safeguards remain in place, ISPs would continue to be able to access their customers over ILEC facilities regardless of whether CLEC competition emerges. This case poses a different issue, because it threatens to eliminate the *only* available avenue for ISP access. Therefore, the § 271 case provides no guidance for the evaluation of the instant BellSouth petition.

b. The Commission Has Not Established Alternative Safeguards

Computer Inquiry safeguards are also necessary for the simple reason that the Commission has not established any other safeguards designed to assure a competitive market for information or addressed the potential legal and practical difficulties of doing so. While the Commission should not grant the requested forbearance in any event, the Commission may not do so based on the unsupported promises of BellSouth that it will not harm competition.

c. Price Cap Regulation Is Insufficient to Protect Against Cross-Subsidization

The Commission adopted the *Computer Inquiry* safeguards to make "competitive abuses easier to detect and more difficult to accomplish."[78] It did not, however, expect the safeguards themselves "to alter the incentives a carrier might have to engage in discrimination or cross-

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[77] *Id.* ¶ 23-24.

[78] *In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations,* Report and Order, 104 FCC2d 958 ¶ 13 ("*Computer III*").

subsidization in [the] enhanced services … markets."[79] The Commission also observed that competition in certain markets provided a limited degree of protection against cross subsidization but that the BOCs' "motivation to cross-subsidize" had not decreased because of limited competition.[80]

BellSouth still retains those same incentives the Commission addressed in *Computer III*. BellSouth controls the vast majority of the market for facilities based voice services in its region. While CLECs do compete in the local exchange and exchange access markets, existing competition is still not significant enough to discipline possible cross subsidization of competitive services with monopoly profits. In the business market, carriers are still largely reliant on ILEC bottleneck facilities, as evident in the Commission's recently announced *Triennial Review Remand Order*.[81] In the residential market, carriers have no alternative last mile facilities to residential customers and cannot rely on BellSouth's unbundled loops to provide broadband access to those customers. Until further facilities based competition takes root and breaks down BellSouth's monopoly in the local exchange and exchange access market, BellSouth will retain the incentive to cross subsidize its broadband service with monopoly rents extracted from markets where it remains the monopolist.

BellSouth contends that the Commission's shift from rate-of-return regulation to price cap regulation after *Computer III* eliminates the incentive and ability to cross subsidize competitive services, and broadband services in particular.[82] However, subsequent to the

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[79] *Id*.

[80] *Id.* at ¶ 96.

[81] *See e.g. TRO Remand Press Release* at 1-2; Separate Statement of Chairman Powell at 1.

[82] Petition at 24.

Commission's *Price Cap Order*,[83] the Commission adopted the *BOC Safeguards Order*, in which the Commission reiterated the need for the existing accounting safeguards BellSouth complains about and even added safeguards against cross-subsidization despite recognizing that price cap regulation could reduce the BOCs' ability to cross subsidize.[84] The Commission found that its policy of safeguarding consumers from cross subsidization of competitive services with monopoly services remained vital even with the shift to price cap regulation, and that existing safeguards were insufficient to deter cross subsidization.[85] Accordingly, there is no basis now for the Commission to reverse course and conclude that price cap regulation permits forbearance from long standing accounting rules designed to deter cross-subsidization.

d. BOC Incentives to Harm Competitors Will Outweigh Incentives to Wholesale

The Commission has consistently proclaimed that the best way to protect competition in the information services market is to ensure that information service providers have multiple wholesale alternatives to the telecommunications inputs that are necessary to provide their information services. As the Commission observed in the *Computer III Remand Further Notice*:

> Competition in the local exchange and exchange access markets is the best safeguard against anticompetitive behavior. BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access to basic services. Stated differently, when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they

[83] Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990).

[84] Report and Order, *Computer III Remand Proceedings: Bell Operating Company Safeguards And Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 ¶ 12 (1991).

[85] *Id*. ¶¶ 12-14.

> risk losing business from their ISP customers for basic services to these competing telecommunications carriers.[86]

Currently these "competing telecommunications carriers" that ISPs are supposed to rely on either don't exist in most markets, or themselves rely on telecommunications inputs from the same BOCs. Of course, as noted, the Commission has limited CLEC access to ILEC bottleneck facilities under 251. Of course CLECs have responded far more rapidly to ISP needs and CLEC deployment is partly responsible for the boom in information services since 1996.

As discussed above, ISPs do not have access to cable broadband facilities, and the entry of a "third pipe" provider in most markets appears to be a remote possibility. The effective competition safeguard desired by the Commission to protect against anticompetitive behavior therefore simply does not exist.

B. The Requested Forbearance Would Harm Consumers

Section 10(a)(2) provides that the petitioner must demonstrate that the enforcement of a regulation or statutory provision is not necessary for the protection of consumers.[87] Under this criterion, the Commission may deny a forbearance petition where there remains a "strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation."[88] The D.C. Circuit rejected any suggestion that the term "necessary" in Section 10(a)(2) means that the regulation at issue is "absolutely essential or indispensable."[89] In other words, a regulation may be "necessary" even though acceptable alternatives have not been exhausted.[90]

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[86] *Computer III Further Remand Further Notice*, at 6071 ¶ 49.

[87] 47 U.S.C. § 160(a)(2).

[88] *CTIA*, 330 F.3d at 512.

[89] *Id*. at 510.

[90] *Id*.

Using this framework for analysis, the Commission retained the wireless local number portability rules despite its finding that the absence of number portability for wireless subscribers was not a total barrier to entry.[91] In that case. the Commission's predictive judgment that consumers would be more likely to switch carriers if their numbers were portable was sufficient justification for denying the forbearance.[92]

The Commission may also deny a forbearance petition when it finds there is the potential that competition will be reduced or rate increases may result from elimination of the provision or regulation.[93] In the *1999 Biennial Review Depreciation Order*, the Commission determined that:

> Forbearance of the depreciation prescription process could potentially trigger large increases in a carrier's depreciation expenses which could in turn result in unwarranted increases in consumer rates. These increased depreciation expenses and consumer rates would likely to continue for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers.[94]

BellSouth shamelessly contends the *Computer Inquiry* rules "affirmatively harm consumers" by raising costs, impeding competition and stifling investment. Each of these contentions is patently false.

1. <u>*Computer Inquiry* Safeguards Do Not Raise the BOC's Costs</u>

BellSouth claims that *Computer Inquiry* safeguards compliance costs approximately $45.28 per end user *utilizing BellSouth's broadband network*.[95] Of course this figure is simply irrelevant. While it is possible that BellSouth's *Computer Inquiry* obligations may cost $48.3

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[91] *Id*. at 512.

[92] *Id*.

[93] *See 1998 Biennial Regulatory Review—Review Of Deprecations Requirements For Incumbent Local Exchange Carriers*, 15 FCC Rcd 242, 267 ¶ 59 (1999).

[94] *Id*.

[95] Petition at 21.

million, it is impossible to understand how *all* of those costs can be attributed to end user customers that use BellSouth's broadband network, as BellSouth provides transmission services to ISPs (including dial-up access) that don't involve broadband services at all. Even if BellSouth's figures were accurate, the larger question is what is the cost to the economy if the safeguards are eliminated. For all the reasons stated in these comments, those costs would be enormous.

BellSouth claims with respect to its services such as RBAN that it "must first make the underlying transmission functionality available to all ISPs and then develop the corresponding non-regulated enhanced services offering."[96] BellSouth cites to no rule or case supporting the proposition that it is required to use separate facilities or employees to make the required non-discriminatory offering of underlying transmission service. In fact, *Computer III* rules eliminated any requirement for structural separation and permitted BOCs to provide regulated and enhanced services on an efficient, integrated basis. The Commission has also eliminated the CEI filing and approval provisions for information services in 1999 to eliminate this precise problem.[97] In reality, BellSouth appears to be complaining about alleged affects of CPNI rules, not about *Computer Inquiry* rules.[98] Accordingly, BellSouth's complaints about the cost of compliance with *Computer Inquiry* safeguards can be given no weight.

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[96] Petition at 22.

[97] *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA* Requirements, CC Docket 98-10, Report and Order, 14 FCC Rcd 4289, 4303 ¶ 21 ("lag in bringing desirable services to the public makes it necessary to streamline the CEI requirements.")

[98] *See* Ex parte Letter to Marlene H. Dortch from L. Barbee Ponder, Counsel for BellSouth, WC Docket 02-33, 02-52 CC Dockets 98-10, 95-20, 01-337 (Aug. 12, 2004) at 10-11.

2. *Computer Inquiry* Safeguards Promote Competition

Contrary to BellSouth's contentions, *Computer Inquiry* safeguards do not deter but promote competition, by providing the essential regulatory underpinnings that will protect against ILECs' ability and incentive to disadvantage competitors. As stated elsewhere in these comments, BellSouth could potentially seriously harm independent VoIP providers. Therefore, the Commission should conclude that forbearance would harm consumers by harming the competition that could bring lower prices and greater service choices.

3. *Computer Inquiry* Safeguards Promote Investment

BellSouth goes to great length to suggest that the Commission should grant the petition because § 706 favors the promotion of broadband deployment as a statutory goal. However, even assuming forbearance would promote investment, the forbearance provisions of § 10 of the Act do not permit the imputation of Section 706 goals in derogation of the explicit statutory goals of § 10, namely protecting consumers and enforcing the mandates of the Act regarding just and reasonable prices and nondiscrimination. Moreover, Section 706 does not afford the Commission an independent grant of forbearance authority.[99] Therefore, even if it were the case that the safeguards stifled investment, the Commission may not use Section 706 to ignore the statutory standards for forbearance. Because BellSouth has not met the standards for forbearance, the Commission may not grant the petition based on Section 706 goals.

In any event, BellSouth has offered no more than conclusory, unsupported allegations that *Computer Inquiry* safeguards harm investments. In fact, the evidence and announcements

[99] *See Association of Communications Enterprises v. FCC*, 235 F.3d 662, 666 n.7 (D.C. Cir. 2001) (noting Commission's conclusion that § 706 is not an independent grant of authority to forbear, but instead only provides an instruction that the Commission should utilize s 10's forbearance authority in the context of advanced services).

that BOCs have been, and are, investing in new broadband networks, provides ample justification for the Commission rejecting BellSouth's contentions on this issue.

C. Forbearance Would Not Serve the Public Interest

The Commission may only forbear if the petitioner can demonstrate that the provision or regulation is no longer in the public interest. The Commission typically interprets the term public interest broadly. Because, as explained elsewhere in these comments, the requested forbearance would permit ILECs to harm competitors and consumers, it clearly would not serve the public interest to grant the BellSouth petition.

Moreover, central to the public interest analysis in section 10(a)(3) is the impact of the proposed forbearance on competition among telecommunications carriers. Section 10(b) compels the Commission to "consider whether forbearance from enforcing the provision or regulation will enhance or promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[100] The Commission cannot grant forbearance relief under 10(a)(3) when removing a regulation will be harmful to "competition among providers of telecommunications services." BellSouth's petition presents exactly those kinds of harms.

BellSouth claims that its petition advances the public interest, referring to "goals" the Commission purportedly enunciated in the Cable Modem declaratory ruling now on appeal to the Supreme Court in *Brand X*. BellSouth claims that elimination of *Computer Inquiry* safeguards and Title II regulation would make an ILEC "a more effective competitor." As discussed elsewhere, data demonstrates that in the only market where cable has greater market share than the ILECs, the residential market, the ILECs added more new customers than cable in 2003.

[100] 47 U.S.C 160(b).

BellSouth further contends that "no regulatory rule is necessary to ensure independent ISPs access to BellSouth's network."[101] This proposition flies in the face of 30 years of *Computer Inquiry* law at the Commission. Since *Computer II*, the Commission has continued to impose the fundamental principle of the *Computer Inquiry*, that facilities-based carriers that provide information service over their telecommunications facilities must provide the transmission component of that information service on a nondiscriminatory basis to information service providers. Not once in the 25 years since *Computer II* has the Commission deviated from that core principle, even for carriers that were non-dominant and lacked any market power.[102] There is certainly no precedent for the Commission to deviate from that principle in this instance, particularly for a carrier or class of carriers that retains significant market power.

BellSouth claims that if freed from all Title II and *Computer Inquiry* safeguards it would negotiate "private carriage" arrangements with individual ISPs "tailored" to the unique circumstances of particular ISPs. There is no restriction, however, in the *Computer Inquiry* rules or Title II that deny BellSouth this ability. All that the *Computer Inquiry* rules require is that BellSouth make such deals available to other ISPs on a nondiscriminatory basis and that it tariff the transmission component. That does not prevent BellSouth from developing an offering that is well suited to a particular ISP in which other ISPs may have no interest. Under the Commission's current rules, BellSouth could likely offer "tailored" arrangements to ISPs under contract tariffs in many markets. BellSouth's purported interest in serving smaller ISPs with DS1 interfaces rings hollow while elsewhere in its petition it complains about the burdens of

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[101] Petition at 28.

[102] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket 96-61, *1998 Biennial Regulatory Review --Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, CC Docket 98-183, Report and Order, 16 FCC Rcd 7418, 7442, ¶ 40 (2001) ("*CPE Bundling Order*").

providing ISPs access to its transmission services.[103] Therefore, forbearance would not serve the public interest taking into account the impact of forbearance on competition.

1. BellSouth's Practice of Tying its DSL Service with its Local Exchange Service is Not in the Public Interest

BellSouth's intent and ability to discriminate in the absence of Title II and *Computer Inquiry* regulation is not merely speculative. BellSouth has *already* been engaging in discriminatory practices in violation of Sections 201 and 202 with significant anticompetitive and anti-consumer effects. To protect its core circuit-switched voice services from competition, BellSouth seeks to leverage its strong position in the broadband market to protect its voice services by forcing customers to keep BellSouth's circuit-switched service as a condition of receiving ADSL service from BellSouth. BellSouth will thus refuse to sell its DSL service to a CLEC voice customer, even where its DSL facilities are readily available to the customer's premises. Moreover, BellSouth refuses to sell wholesale DSL to any ISP who seeks to serve that customer. This disingenuous tying requirement prevents consumers from being able to take advantage of the benefits of competitive alternatives offered by CLECs, wireless carriers, cable companies, and VoIP providers, without any offsetting public interest benefit. Because most small businesses and many consumers do not have a comparable broadband alternative to BellSouth ADSL, BellSouth is able to force them to make a choice they should not have to make – to give up either their chance of obtaining broadband or their right to choose a different voice provider.

Several state commissions have determined that BellSouth's DSL tying practice violates state laws similar to Title II.[104] The Kentucky Commission found that BellSouth's "practice of

[103] *See Petition* at 25, *citing* Comments of Alcatel USA, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket 02-33 (filed May 3, 2002) at 3-4.

tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[105] The Georgia Commission likewise observed that the tying practice is only explicable as an attempt by BellSouth "to insulate its voice service from the competition that might drive prices down.… The purpose of such a policy can only be so that BellSouth can charge more for the services together than it could apart."[106]

BellSouth's petition to exempt itself from Title II regulation would arguably legalize and endorse this anticompetitive policy,[107] and fuel BellSouth's arguments that states should be preempted from protecting its citizens from BellSouth's discrimination. In light of the real-world anticompetitive, anti-choice consequences of BellSouth's tying policy, it is impossible for the Commission to reasonably conclude that grant of BellSouth's forbearance petition would be in the public interest or would result in adequate protection for consumers.

CLECs in the BellSouth region are unable to provide their own DSL services to most consumers. Though FDN has built its own facilities and network to the maximum extent possible, like other CLECs operating in BellSouth's service territory, it is unable to provide

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[104] *FDN DSL Tying Comments* at pp. 4-6 (describing state commission decisions in Florida, Georgia, Kentucky and Louisiana).

[105] *BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket 03-251, Petition (hereinafter, "*BellSouth Tying Petition*"), at Attachment 8 (July 12, 2002 Order of the Kentucky Public Service Commission at 7).

[106] Order on Complaint, *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 11901-U (Georgia PSC Oct. 21, 2003) ("*Georgia Order*").

[107] In addition to violating Sections 201, 202, and 251, BellSouth's DSL tying practice also violates federal antitrust laws and various state laws.

competitive DSL services to most of its customers. Even before the Commission's recent decisions limiting BellSouth's obligation to unbundle certain broadband loops, CLEC DSL has been unavailable to most consumers in the BellSouth region because of BellSouth's widespread deployment of Digital Loop Carriers (DLCs), which in Florida serve 90% of the end-user premises in its region.[108] As the Commission is well aware, CLECs are unable to provide DSL services where DLCs are deployed without collocating their own DSLAM functionality at remote terminals.[109] FDN would like to be able to provide DSL to customers served by DLCs, but as it has previously explained in detail to the Commission, it is not economically feasible for FDN to do so at this time or in the foreseeable future. . FDN is not alone—no CLEC has deployed DSLAM functionality at *any* of BellSouth's 12,000 remote terminals in Florida. As a consequence, BellSouth controls 98-99 percent of the DSL market in Florida, and end-users have no meaningful alternatives to BellSouth DSL where BellSouth has deployed DLC architecture on a large scale.[110]

To be able to provide the packages of bundled services that customers increasingly demand, CLECs in the BellSouth region must therefore explore alternatives to self-deployment of DSL. But for BellSouth's DSL tying policy, one potentially viable option would be to purchase wholesale DSL transmission from BellSouth as an ISP. However, the elimination of BellSouth's *Computer Inquiry* and Title II obligations would likely eliminate this option. Therefore, the forbearance of BellSouth's *Computer Inquiry* obligations would not only threaten

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[108] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 1-3 and Exhibit 1 (presenting evidence based upon BellSouth's admissions and testimony that 90% of end-users in the BellSouth-Florida region are served by DLC loops, and that BellSouth possesses a *99%* share of the DSL market in its region in Florida.)

[109] *See, e.g., Triennial Review Order* at ¶ 290.

[110] Though cable modem service is available to many residential customers, it is not an alternative for the vast majority of businesses who are FDN's main customers. *See id.* at 11-12.

consumer access to information services providers, but, also undermines consumer choice in the voice services market. Grant of BellSouth's petition would therefore undermine the core principles of the Communications Act of 1934 (reasonable and nondiscriminatory rates and practices), the national policy of an open information services market, and the Telecommunications Act of 1996 (local competition).

D. There Is No Basis For the Commission to Forbear from the Core Statutory Provisions of Title II

In addition to forbearance from application of *Computer Inquiry* safeguards, BellSouth's petition recklessly suggests that the Commission can forebear from applying the full panoply of Title II common carrier obligations that govern BellSouth's provision of broadband service. BellSouth's petition thus strikes at the very heart of Title II from the core provisions of §§ 201-202 to the market opening provisions of §§ 251 and 271.

Sections 201 and 202, in conjunction with Section 208, represent the core consumer and competition preserving protections embodied in Title II. While the *Computer Inquiry* safeguards are deeply rooted in the prohibition against unjust and unreasonable practices and pricing in Section 201(b), and the limit on unreasonably discriminatory practices and pricing in § 202, there is a distinction between the prohibitions themselves and *Computer Inquiry* safeguards designed to more readily identify and stamp out anticompetitive behavior. It would be unprecedented for the Commission to completely eliminate the core obligations of Title II. The Commission has frequently deregulated common carrier services but has always maintained that the provisions of §§ 201 and 202 continue to apply and can be enforced through the complaint provisions of § 208.

In the *AT&T Non-Dominance Order*,[111] the Commission determined that AT&T, while non-dominant in the domestic interstate interexchange market, would "still be subject to

[111] *AT&T Non-Dominance Order*, at 3282 ¶ 13.

regulation under Title II," including sections 201 and 202, and the Commission's complaint process set forth in sections 206-209.[112] Even in the highly-competitive mobile services and interexchange services markets, all carriers, regardless of market share, remain subject to Sections 201 and 202 and the Commission's complaint jurisdiction.[113] Similarly in the *Pricing Flexibility Order* granting incumbent LECs subject to price cap regulation, pricing flexibility for their interstate access charges, the Commission noted the availability of section 208 complaints to raise claims under sections 201 and 202 and enforce those statutory provisions.[114]

Here, BellSouth asks the Commission to obliterate the very foundation on which the Act was premised. There is simply no precedent for such extraordinary relief. The same reasons that Joint CLECs outlined above apply with equal if not greater force in opposition to BellSouth's shameless attempt to gut Title II of the Act and demonstrate that there is simply no basis for the radical surgery BellSouth asks the Commission to perform on the Act.

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[112] *Id.* ¶ 130, declaring that "the status of AT&T as either a dominant or non-dominant carrier, therefore, does not alter its obligation to comply with" sections 201 and 202.

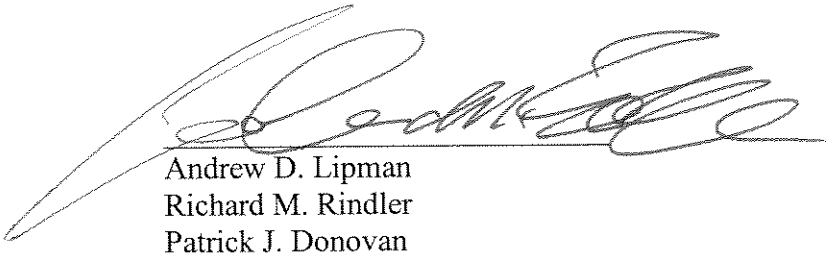
[113] *See* 47 C.F.R. § 20.15(a) ("Commercial mobile radio services providers, to the extent applicable, must comply with Sections 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, and 228 of the Communications Act").

[114] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14241-2 ¶¶ 41, 65, 83, 127, 129, 131 (1999).

V. CONCLUSION

For these reasons, the Commission should dismiss or deny the above-captioned petition.

Respectfully Submitted,



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